

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THERASENSE, INC.,
Plaintiff,

v.

BECTON, DICKINSON AND COMPANY,
Defendant.

No. C 04-02123 WHA

Consolidated with

No. C 04-03327 WHA
No. C 04-03732 WHA
No. C 05-03117 WHA

AND CONSOLIDATED CASES.

**ORDER RE ATTORNEY'S
FEES AND COSTS**

1. As held in a companion order of the same date, defendants Bayer Healthcare LLC, Becton Dickinson and Company, and Nova Biomedical are entitled to recover reasonable attorney's fees and costs under 35 U.S.C. 285 with respect to litigation involving the '551 patent.

2. The following procedure will be used to determine the amount of the award. The procedure is structured to allow meaningful evaluation of the time expended by counsel.

3. No later than **SEPTEMBER 25, 2008, AT NOON**, said defendants' attorneys must file and serve detailed declarations, organized by discrete projects, breaking down all attorney and paralegal time sought to be recovered. For each project, there must be a detailed description of the work, giving the date, hours expended, attorney name, and task for each work entry, in chronological order. A "project" means a deposition, a motion, a witness interview, and so forth. It does not mean generalized statements like "trial preparation" or "attended trial."

It includes discrete items like “prepare supplemental trial brief on issue X.” The following is an example of time collected by a project.

PROJECT: ABC DEPOSITION (2 DAYS IN FRESNO)

Date	Time-keeper	Description	Hours x	Rate =	Fee
01-08-01	XYZ	Assemble and photocopy exhibits for use in deposition.	2.0	\$100	\$200
01-09-01	RST	Review evidence and prepare to examine ABC at deposition.	4.5	\$200	\$900
01-10-01	XYZ	Research issue of work-product privilege asserted by deponent.	1.5	\$100	\$150
01-11-01	RST	Prepare for and take deposition.	8.5	\$200	\$1700
01-12-01	RST	Prepare for and take deposition.	<u>7.0</u>	\$200	<u>\$1400</u>
Project Total:			<u>23.5</u>		<u>\$4350</u>

4. All entries for a given project must be presented chronologically one after the other, *i.e.*, uninterrupted by other projects, so that the timeline for each project can be readily grasped. Entries can be rounded to the nearest quarter-hour and should be net of write-down for inefficiency or other cause. Please show the sub-totals for hours and fees per project, as in the example above, and show grand totals for all projects combined at the end. Include only entries for which compensation is sought, *i.e.*, after application of “billing judgment.” For each project, the declaration must further state, in percentage terms, the proportion of the project directed at issues for which fees are awardable and must justify the percentage. This percentage should then be applied against the project total to isolate the recoverable portion (a step not shown in the example above).

5. A separate summary chart of total time and fees sought per individual timekeeper (not broken down by project) should also be shown at the end of the declaration. This cross-tabulation will help illuminate all timekeepers’ respective workloads and roles in the overall case.

6. The declaration must also set forth (a) the qualifications, experience and role of each attorney or paralegal for whom fees are sought; (b) the normal rate ordinarily charged for

1 each in the relevant time period; (c) how the rates were comparable to prevailing rates in the
2 community for like-skilled professionals; and (d) proof that “billing judgment” was exercised.
3 On the latter point, as before, the declaration should describe adjustments made to eliminate
4 duplication, excess, associate-turnover expense, and so forth. These adjustments need not be
5 itemized but totals for the amount deleted per timekeeper should be stated. The declaration
6 must identify the records used to compile the entries and, specifically, state whether and the
7 extent to which the records were contemporaneous versus retroactively prepared. It must state
8 the extent to which any entries include estimates (and what any estimates were based on).
9 Estimates and/or use of retroactively-made records may or may not be allowed, depending on
10 the facts and circumstances. Under no circumstances should the application include items
11 previously uncharged to the client; nor should it include items the client has disputed and
12 refused to pay.

13 7. Ordinarily, no more than one attorney and one paralegal need be present at a
14 deposition and no more than two attorneys and two paralegals need be present at trial in the
15 courtroom; more will normally be deemed excessive. Ordinarily, no more than two attorneys
16 and one paralegal need attend a law-and-motion hearing; more will normally be deemed
17 excessive. To allow for symmetry, however, the award may take into account the staffing used
18 by the opposing party and the reasons therefor. Excessive staffing by the other side, however,
19 will still not justify excessive staffing by the prevailing side. Training of young lawyers is to be
20 encouraged but if they play only a minimal role then their training is the responsibility of the
21 law firm and the time should not be billed or recovered.

22 8. If the opposing party doubts the accuracy of any declaration, then the moving
23 party must immediately produce the original underlying time records for inspection upon
24 request. The opposing party must then file and serve any opposition. In this case, the
25 opposition will be due **21 CALENDAR DAYS** after the moving parties’ detailed declarations are
26 filed. If the opposing party contends that any item or project was excessive, then its opposition
27 must explain why and provide a declaration setting forth completely all time expended by the
28 opposing party on the same and on similar projects, in the same format described above, so that

1 symmetry may be considered, promptly making available the underlying records for inspection
2 if requested. If any billing rates are challenged, then the opposition must state the billing rates
3 charged to the opposing party for all professionals representing the opposing party in the case
4 and their experience levels. The opposing declaration must also state, as to each project, the
5 percentage of the project the opposition contends was directed at issues on which fees are
6 awardable, stating reasons for the percentage. This percentage should then be applied against
7 the project total to isolate the recoverable portion.

8 9. The opposing submissions may not simply attack the numbers in the application.
9 It must also set forth a counter-analysis. The counter-analysis should be in the same format
10 required of the applicant, arriving at a final number. The opposition must clearly identify each
11 line item in the application challenged as excessive, improper or otherwise unrecoverable and
12 explain why. The opposition, for example, may annotate (legible handwriting will be
13 acceptable) the applicant's declaration to isolate the precise numbers at issue.

14 10. With the benefit of both sides' filings, representatives of the parties with final
15 decision authority shall meet in person and confer to try to resolve all differences as to the
16 amount. If no agreement is reached, the moving parties must file and serve a declaration
17 showing full compliance with this paragraph, explaining when, where and who met, their
18 decision authority, how long they met, what documents were reviewed together, and the
19 principal points of disagreement. This must be done within **35 CALENDAR DAYS** of the filing of
20 movants' detailed declarations.

21 11. If no agreement is reached, a special master — who shall be a private attorney —
22 shall be appointed. If the parties cannot agree on a special master, then the Court shall select a
23 special master. The parties must advise the Court on this in the same submission referenced in
24 the preceding paragraph.

25 12. The special master shall have all the powers set forth in FRCP 53(c) and
26 FRCP 54(d)(2)(D). The parties shall provide the special master with copies of all motion
27 papers and other documents relevant to this dispute. The special master shall review the briefs
28 and declarations by the parties on the pending motion, hear argument, and then determine a

1 reasonable amount to award, including any fees on fees. The special master shall also
2 determine the extent to which any discovery should be permitted — with the caution that
3 discovery should be the exception and not the rule. The special master shall then prepare and
4 file a report on recommended findings and amount.

5 13. Absent any supplementation allowed by the special master, the foregoing
6 submissions (together with the briefs already filed) shall be the entire record for the motion.
7 There will be no replies unless allowed later by the special master. Any further submissions for
8 the special master's use should not be filed with the Court. If objections are later made to the
9 special master's report, the objecting party must file a declaration submitting to the Court a
10 complete appendix of relevant communications with the special master.

11 14. The Court will allocate the fees of the special master in a fair and reasonable
12 manner, taking into account the reasonableness of the parties' respective positions and the
13 special master's recommendation in this regard. To the extent the movants must pay, then the
14 special master's compensation shall be *deducted* from the attorney's fee award. To the extent
15 that the opposing party must pay the special master, then it shall pay the special master *and* pay
16 the award. The Court will, however, reserve final judgment on allocation of the expense of the
17 special master until a final determination of the fee issue. A final award shall then be entered.

18 15. Only *reasonable* fees and expenses will be allowed. Attorney's fees and
19 expenses are not reasonable merely because it has become fashionable for law firms to bill
20 many hours and charge high rates. Special scrutiny must be given to excessive billings,
21 particularly with respect to large group meetings with many timekeepers, file and document
22 reviews by timekeepers with little or no need to do so, associate training time that should be the
23 responsibility of the firm (and not the client), excessive numbers of timekeepers at trial,
24 hearings, depositions, and client meetings, summer associate projects of little value, associate
25 turnover and restart time for replacements, and all time associated with unwarranted motion
26 practice (initiated by the moving parties). That the other side engaged in similar billing
27 practices may excuse some billing excesses, to a limited degree, but only to a limited degree, for
28 a court-ordered fee award should not bless excessive billing practices. This order does not yet

1 find that any such practices have occurred here but it urges the prevailing parties to trim their
2 requests of all excesses. If the application is excessive to the point of manifest overreaching,
3 then it may be denied in its entirety.

4 16. Statutory costs will be determined in strict compliance with the 28 U.S.C. 1920
5 and Local Rule 54. To the extent that litigation expenses above those allowed as statutory
6 recoverable costs are sought they shall be itemized and analyzed as per the same timetable as
7 for attorney's fees.


8 17. With respect to non-statutory expenses, only such expenses as were reasonable
9 shall be recoverable. All airfare shall be recoverable only at coach rates. Hotel expenses shall
10 be recoverable only at mid-level rates or less. Meal expenses shall be recoverable only at
11 modest rates and no alcohol or entertainment expenses shall be recoverable. No limousine
12 services shall be recoverable. Photocopying, imaging, and courier expenses shall be
13 recoverable only at prevailing mid-level rates unless circumstances justified premium services.

14 18. No declaration or submissions shall be submitted under seal.

15 19. Please do not ask for extensions.

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17 **IT IS SO ORDERED.**

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19 Dated: August 21, 2008.

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22 WILLIAM ALSUP
23 UNITED STATES DISTRICT JUDGE
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